

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA : CRIMINAL ACTION

v. :

OSWELL MCGHEE : NO. 07-733

Baylson, J.

October 17, 2011

I. Introduction

In a five-count Second Superseding Indictment, Defendant Oswell McGhee (“Defendant”) is charged with possession with intent to distribute controlled substances (Counts One, Two and Three), possession of firearms in furtherance of drug trafficking (Count Four), and possession of a firearm by a convicted felon (Count Five). ECF No. 51. Defendant has moved to dismiss the Second Superseding Indictment,¹ or, in the alternative, to preclude reference to evidence recorded on Property Receipt No. 2721497. ECF No. 38. The Court held a hearing on this and other pre-trial motions on October 14, 2011. ECF No. 60. For the reasons discussed below, Defendant’s Motion to Dismiss the Second Superseding Indictment will be DENIED.

II. Factual Background and the Parties’ Contentions

The following alleged facts form the basis of Defendant’s Motion. A shooting victim identified Defendant as the person who shot him.² Def. Br. at 1. Philadelphia Police consequently went to 2525 N. 8th Street to execute a warrant for Defendant’s arrest and a warrant for search

¹Defendant originally moved to dismiss the Superseding Indictment, but at a hearing held before the Court on October 14, 2011 orally amended his Motion to reference the Second Superseding Indictment. ECF No. 60.

² Defendant was later cleared of this accusation.

and seizure. Id. Defendant was not present when they arrived. Id. at 1-2. Defendant's parents stated that the bedroom in the rear belonged to Defendant. Id. at 2. The police recovered from the room firearms, drugs, cash, and a variety of items which they recorded on Property Receipt No. 2721497. Id. The items on the Property Receipt included zip lock bags, a scale, a money counter, and mail addressed to Oswell McGhee. Id. Defendant was later arrested outside the 8th Street residence. Id. The case was federally adopted. See Def. Ex. B.

In preparing Defendant's defense, counsel for Defendant requested discovery, including "copies of any mail, or paperwork recovered from 2525 N. 8th Street, regardless of the addressee." Def. Ex. A. The Government responded that this evidence was no longer available because the Philadelphia Police Department, seemingly unaware that the reason the case was no longer active in the Commonwealth was because it had been federally adopted, destroyed the evidence. Def. Ex. B. This was part of the Philadelphia Police Department's regular practice to destroy evidence when a case was disposed of by the courts or the one-year period for investigation had ended. Government Ex. at 1-5. At the October 14, 2011 hearing, defense counsel stated that she agreed the evidence was destroyed inadvertently. ECF No. 60.

Defendant correctly notes that because all five counts charged involve possession, and because Defendant was arrested outside the residence in question, the Government will have to establish constructive possession to sustain convictions. See Def. Br. at 2-3. Defendant argues that the mail and other evidence purportedly connecting him to the 8th Street residence therefore had exculpatory value, and its destruction violated his due process rights. Id. at 3-9.

III. Legal Standard and Analysis

The United States Supreme Court decisions in California v. Trombettta, 467 U.S. 479

(1984) and Arizona v. Youngblood, 488 U.S. 51 (1988) set forth the standard for determining whether the government's failure to preserve evidence violates a criminal defendant's due process rights under the Fourteenth Amendment. Lambert v. Blackwell, 387 F.3d 210, 267 (3d Cir. 2004). Youngblood established that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. at 58; see also Lambert, 387 F.3d at 267.

Here, Defendant admits that the Philadelphia Police Department destroyed the evidence inadvertently. ECF No. 60. This Court is not aware of any case, nor could counsel for Defendant point to one, where a court dismissed an indictment due to an inadvertent destruction of evidence. See id. The Court is also unpersuaded by Defendant's argument that although the evidence destruction was inadvertent it nonetheless rose to the level of bad faith because it constituted such a gross violation of the government's duty to preserve evidence. See id. Even if the destruction of evidence was negligent, that does not violate due process. United States v. Seibart, 148 F. Supp. 2d 559 (E.D. Pa. 2001) (citing Youngblood, 488 U.S. at 58 and United States v. Deaner, 1 F.3d 192, 201 (3d Cir. 1993)). Moreover, other evidence in this case, including the seized drugs, firearms, ammunition, and receipt for currency, is still available for inspection by Defendant and use at trial by both parties.

VI. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss the Second Superseding Indictment is hereby DENIED. The Court will reserve judgment until trial on Defendant's Motion in the Alternative. An appropriate order follows.